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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 700

JOHN H. PAGE, TRUSTEE, ETC.,
Petitioner,

against

ARKANSAS NATURAL GAS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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Supplemental Brief on Behalf of Petitioner.

Supplementing the original brief filed herein in respect of the points referred to by the Court of Appeals as a basis for its decision, the following is with respect submitted:

I.

The order of the referee directed to Harold L. (Mike) Lyvers had no force or effect whatever upon Mike Lyvers Syndicate.

Reference is made by the Court of Appeals to the provision in Article 10 of the Declaration of Trust to the effect

that the trustee shall own in his own name the legal title to the corpus of the trust, and further to the fact that Mike Lyvers was the trustee of an express trust, and to the ruling of the Court in previous cases to the effect that such a trustee could sue in his own name "without joining with him the party for whose benefit the action was brought" (R. 215). The phrase quoted affords an explanation of the recitals of the Declaration of Trust and decisions referred to. It is true that Article 10 of the Declaration of Trust provides that the trustee shall own in his own name the legal title to the corpus of the trust, but this means that he shall own and hold the property in his own name as trustee of Mike Lyvers Syndicate, rather than that title to the real estate be held in the *name of 3,113 persons* (R. 126) *who constituted the beneficial owners of the corpus of the estate.* It is provided in Article 20 of the Declaration of Trust that the document must be construed as a whole and in this connection the provisions of Article 15 must be referred to, wherein it is stipulated:

> "All conveyances to the trustee of this estate shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, and all conveyances from such trustee shall read in the name of Mike Lyvers, Trustee, Mike Lyvers Syndicate, *and likewise all written instruments pertaining to this trust shall be so executed*" (R.23).

The decisions which are cited by the Court of Appeals holding that the trustee of an express trust may sue in his own name may likewise be explained. This expression means that the trustee may sue in his own name as trustee without the necessity of joining all of the beneficial owners of the trust estate as parties plaintiff. The citations made by the Court in its opinion demonstrate this to be the correct prin-

ciple. It was formulated to avoid the rule in many jurisdictions requiring the real party in interest to bring suit. In *Mathis vs. Hemingway, 24 Fed. (2) 951*, it was clearly made to appear that the plaintiff brought suit in his capacity as trustee. We quote from the report of the case at page 953:

> "The complainant alleged the resignation of Moorehead Wright as trustee, the appointment of himself as his successor, the execution of the first and second deeds of trust, the indebtedness secured thereby, and default in the payments agreed to be made by the grantors, etc."

In *Kerrison, Assignee, vs. Stewart, et al., 93 U.S. 155*, it is likewise made to appear from the opinion that the trustee appeared in the proceedings under consideration in his representative capacity, and the only question was whether it was also necessary to make parties to the proceeding the persons for whose benefit the trust was made, being certain creditors of the firm of Kerrison and Leiding. It was decided that it was unnecessary to make such *cestuis que trustent* parties to the action. The case would have application to the case at bar if the question here were whether all of the unit holders of Mike Lyvers Syndicate were necessary parties. The principle of law involved is made a part of equity rule 37, wherein it is provided:

> "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought."

And it is stated that while this is a new rule, it is merely declarative of settled law. *Hopkins Federal Equity Rules, 7th Edition,* p. 224. But it is a misapplication of this principle to say that the trustee of an express trust may sue in his own name without qualification and without plainly indicating his representative character.

The rule is well settled to the effect that one suing as trustee must set out his representative character, the facts showing the trust relation, the circumstances of his appointment and the powers with which he is vested.

Troxell vs. Delaware, Lackawanna & Western R.R., 227 U.S. 434;
Held vs. Houser, 53 Colo. 363, 127 Pac. 139, 140;
Hutchinson vs. Wood, et al., 109 N.E. 794, 59 Ind. App. 537;
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Wilson vs. Polk County, 112 Mo. 126, 20 S.W. 469;
School District No. 42 vs. Peninsular Trust Co., 13 Okla. 479, 75 Pac. 281.

The cases cited by the Court of Appeals in its opinion are not in contradiction of the doctrine above enunciated, but in affirmance of it. In *Linton vs. Omaha Wholesale Pro-*

duce Market Company, 218 Fed. 331, the capacity of the plaintiff as trustee was not disclosed in the title of his bill of complaint, but the opinion shows that it was distinctly and clearly averred in the body of the bill that the plaintiff sued in his capacity as trustee. An interesting contrast to this case is found in *Leonard vs. Pierce, 182 N.Y. 431, 1 L.R.A. (N.S.) 161,* where it is held that naming a defendant individually in the *title* of the bill and stating a cause of action against him as trustee in the *body* thereof renders the complaint demurrable. The two cases taken together only justify the statement that the authorities are divided upon the question of whether a party must not be expressly designated in his representative capacity both in the *title* or *caption* of the bill and in the *body* of the bill. In *Williams vs. Southern Pacific Company, 54 Cal. App. 571, 202 Pac. Rep.* at p. 356, it was held that an award in a workman's compensation proceeding instituted by the wife of a deceased employee in her individual capacity was not a bar to the whole cause of action in an action under the Federal Employers' Liability Act, brought by her as administratrix for the benefit of herself and an adult daughter, *the plaintiffs in the two proceedings not being the same.* The opinion refers to *Black on Judgments, 2d Ed., Sec. 536,* as authority for the proposition that if one sues as trustee and afterwards sues in his individual capacity in respect of the same subject matter, he is bound by the decree in the former suit, "for if, at that time, he owned the subject matter of the trust, he was representing himself." As in the instant case it is established that Lyvers had no individual interest whatever in the property, but that the title thereto was at all times in Mike Lyvers Syndicate, the conclusion to be drawn from the authorities mentioned is that the adjudication upon the petition of Mike Lyvers individually had no binding force whatever upon Mike Lyvers Syndicate; and this is precisely the conclusion

which the Court of Appeals reached upon the first hearing of this case.

In its first opinion herein the Court of Appeals referred to the provisions of the articles of the Declaration of Trust and specifically to the fact that Mike Lyvers was authorized to hold title as trustee in his own name:

> "The trust was to be known as the Mike Lyvers Syndicate, with Mike Lyvers as trustee, *holding in his own name the legal title to the corpus of the trust*, possessing the sole power of selling, mortgaging, and encumbering the property, in any manner or form, delegating the same, in record form, until superseded, with the sole right to resign and power to name his successor, with the same powers. * * * ." From opinion, *Page vs. Natural Gas & Fuel Corporation, 35 Fed. (2) 462, 464.*

This point, therefore, had been previously considered by the Court of Appeals, and the considerations now stated were not permitted to prevail against its conclusion that the appearance of Mike Lyvers before the referee was as an individual and not as trustee of the Mike Lyvers Syndicate.

In the foregoing discussion it has been assumed for purpose of argument that an issue properly was before the Court in respect of the capacity in which Mike Lyvers was impleaded in the proceedings before the referee. But we invite attention to the fact that upon the trial of this case there was no issue made by the pleadings to the effect that Mike Lyvers filed his intervention in any other than a personal and individual capacity, and that it was therefore beyond the pleadings for the Court to find that the intervention of Mike Lyvers was filed on behalf of Mike Lyvers Syndicate. Article 3 of the answer of the defendant (R.

50) and the latter part of Article 14 (R. 55) dealing with this subject were stricken from the answer (R. 89-90).

We quote from the order of the District Court dealing with plaintiff's motion to strike as follows:

> "That the following allegations appearing in the third paragraph of the answer of Arkansas Natural Gas Corporation and on the second page thereof be and they are hereby stricken from the said answer, to-wit:
>
> "' * * * but defendant denies that said intervention was filed merely in a personal capacity, but to the contrary alleges that said intervention was in truth and in fact filed by the said Mike Lyvers as trustee for the Mike Lyvers Syndicate and on behalf of said syndicate, and that at the hearing upon said intervention said property was claimed by Mike Lyvers for and on behalf of said syndicate and in his capacity as trustee therefor.' (R. 89).

And further,

> "That the following allegations of the fourteenth paragraph of said answer appearing on page 7 thereof be stricken from the said answer, to-wit:
>
> "'In this connection, defendant states and avers that while it is true that the said petitioner Mike Lyvers and the said orders of the referee and of the district court on their face did not formally mention or refer to him as trustee of the Mike Lyvers Syndicate, yet in truth and in fact said petition was filed by the said Mike Lyvers as trustee for the Mike Lyvers Syndicate, all of the proof at the hearing was upon the issue as to whether or not said leases were the property of Mike Lyvers as trustee for the Mike Lyvers Syndicate, and not of Mike Lyvers personally, and at no time did Mike Lyvers at said hearing claim said properties other than as trustee for the Mike Lyvers Syndicate. That while the said pleadings and

orders did not refer to Mike Lyvers as trustee, yet in truth and in fact he acted as trustee in the filing of said petition, and at said hearing claimed the property as trustee for the Mike Lyvers Syndicate, and the true intent and purpose of the order of the referee and of the district court affirming same was to adjudicate the title to said property to be in the bankrupt estate of Mike Lyvers as trustee for Mike Lyvers Syndicate, and to require the said Mike Lyvers to convey, as trustee for Mike Lyvers Syndicate to the trustee in bankruptcy' " (R. 89-90).

And in harmony with these rulings the Court also struck out Article 15 of the answer, which set up the plea of *res adjudicata,* on the basis of the referee's order (R. 90). Article 15 of the answer of the defendant reads:

"Defendant accordingly states that the said quit claim deed thereafter executed by Mike Lyvers as trustee for Mike Lyvers Syndicate was in accordance with and carried out the true intent and spirit of said orders, and the defendant hereupon pleads the aforesaid entire proceeding, consisting of the petition of Mike Lyvers, petition of the trustee in bankruptcy, the testimony at said hearing, and orders of the referee and of the district court at (as) res adjudicata upon all of the issues involved in this case as between this defendant and the complainants herein, and states that the complainants are now by reason thereof estopped to further litigate said issues."

This defense was stricken by Judge Wyman for the reason that the answer as a whole and the exhibits annexed thereto disclosed that the petition of intervention as well as all other pleadings before the Referee mentioned only Mike Lyvers, and consequently there was nothing to support a defense which would result in any deviation from the ruling of the Court upon the first appeal to the effect that the ap-

pearance of Mike Lyvers in his personal capacity could in no way bind Mike Lyvers Syndicate. It follows that upon the trial hereof there was no pleading before the Court which could serve as a basis of this defense. The point not being an issue in the case, the Court of Appeals inadvertently fell into error in placing its decision on this groud. *Foster vs. Goddard, 66 U.S. 506.*

II.

The Referee Was Without Jurisdiction to Make the Order of Date 6th March, 1924, Directed to Harold L. (Mike) Lyvers.

The intervention of Mike Lyvers filed before the referee on the 7th day of February, 1924, prayed only that the referee "do not sell" any of the property referred to therein (R. 31). The answer of the trustee was a general denial, and his prayer was that the intervention be "held for naught." (R. 59-60).

The sale did not occur on February 8, 1924, (R. 59). The trustee then filed a petition styled, "Petition for summary order requiring Mike Lyvers to execute quit claim deed to trustee conveying certain oil and gas leases." (R. 60). This was a proceeding independent of the intervention previously filed by Mike Lyvers, and was in the nature of an action to try title. It was a "controversy" as distinguished from "proceedings in bankruptcy." Bankruptcy Act 23. Mike Lyvers refused to appear at the hearing held by the referee on March 6, 1924, on the petition of the trustee for a summary order against him. Nevertheless the referee proceeded to enter an order directed to Harold L. (Mike) Lyvers, requiring that Lyvers execute conveyances transferring legal title "to all said property" to the trustee in bankruptcy, H. M.

Barney, (R. 33). The Bilyeu lease was at the time of the adjudication of the Morris Syndicate as a bankrupt and at the time the referee made his order upon Mike Lyvers, an undeveloped mineral lease (R. 181). Title to the Bilyeu lease was at all times duly registered upon the public records in the name of Mike Lyvers Syndicate (R. 120).

The foregoing statement discloses that there was no jurisdiction in the referee to make the order.

Daniels, Trustee vs. Guaranty Trust Company, decided 14 March, 1932, Advance Opinions, U.S. Supreme Court, October term, 1931;

Harrison vs. Chamberlain, 271 U.S. 191;

Taubel-Scott-Kitzmiller Co., etc., vs. Fox, 264 U.S. 426;

May vs. Henderson, 268 U.S. 111;

Louisville Trust Company vs. Comingor, 184 U.S. 18;

Jacquith vs. Rowley, 188 U.S. 620;

First National Bank vs. Chicago Title & Trust Co., 198 U.S. 280;

In re Blum (CCA 7), 202 Fed. 883.

"A referee is not in any sense a separate court." *Wiedhorn v. Levy, 213 U.S. 268, 271.*

Bankruptcy Act, Sec. 1, c. 8 defines "courts of bankruptcy," while Sec. 2 reads:

"That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several states, the Supreme Court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy."

Sec. 34:

"Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction,

(1) appoint referees * *, and may in their discretion, remove them, etc."

In *Louisville Trust Company vs. Comingor, 184 U.S. 18*, where an assignee for the benefit of creditors, under the statutes of Kentucky, asserted a claim to certain sums of money in his hands and a referee in a summary proceeding ordered the assignee to pay the sum claimed to the bankrupt's trustee, the Court said:

> "The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforcable, not by execution, but by commitment. 'We think that it could not have been the intention of Congress thus to deptive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights.' *Marshall v. Knox, 16 Wall. 556; Smith v. Mason, 14 Wall. 419.*"

In *Galbraith vs. Vallely, 256 U.S. 846*, a state assignee for the benefit of creditors appeared in a bankruptcy proceeding and filed an account claiming certain fees which he retained. The trustee in bankruptcy filed a petition with the referee asking in a summary proceeding that Galbraith, the assignee, be ordered to show cause why he should not pay over the retained sum.

Galbraith appearing, set up that he was an adverse claimant and there was no jurisdiction.

The referee sustained him, but the District Court and the Circuit Court of Appeals held otherwise.

The Supreme Court said:

"It may be as suggested by the Circuit Court of Appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concern-

"But the right to recover in such instances, only in suits of ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court." (850).

To again quote *Weidhorn vs. Levy, supra:*

"The jurisdiction and authority of a referee in bankruptcy under a general reference is limited to ordinary administrative proceedings and such controversial matters as arise therein and are in effect a part thereof."

Bankruptcy Act Section 23 (U. S. Code, T. 11 Sec. 46) reads:

"(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, ing the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 96 * *."

It is obvious that the jurisdiction here given to district courts is not given to them as courts of bankruptcy and the statute uses the words, "as distinguished from proceedings in bankruptcy," over which alone referees can exercise any authority.

Clause (b) speaks of "consent of the proposed defendant" as necessary when suit is brought in a court other than the one in which the bankrupt may have brought it.

The text of the section excludes the idea that "referees" are contemplated in any way by the language of the act—it is not to be suggested that suits could be instituted before a referee.

Furthermore, consent is not an equivocal matter, and even if given can be withdrawn; the action of Lyvers personally seeking to withdraw his intervention and to keep himself clear of the referee's action is in line with the holding in *Louisville Trust Company vs. Comingor, 184 U.S. 18, 26,* "He made his final protest to the exercise of jurisdiction before the order was entered."

The referee being entirely without right to jurisdiction of the subject matter, his order is a mere nullity.

There was no possession of the Bilyeu lease by the bankrupt or the trustee. The bankrupt did not have possession of the property at the time of the adjudication nor at any other time. In the absence of actual development, constructive or civil possession followed the registered legal title.

> "The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is coextensive with his right, and continues until he is ousted thereof by an actual adverse possession. This

is a settled principle of common law, recognized and adopted by this court in *Green vs. Liter (8 Cranch 229, 230); Barr vs. Gratz (4 Wheat. 213,* 233); *Society, etc., vs. Pawlett (4 Peters 480, 504, 506); Clark vs. Courtney (5 Peters 354, 355),* and is not now to be questioned."

From opinion, *United States vs. Arredondo, et al., 6 Peters 689, 743.*

Compare also,

Newman vs. Mountain Park Land Company, 85 Ark. 208, 107 S.W. 391;

Chancellor vs. Banks, 92 Ark. 497, 123 S.W. 650.

If the receiver tacked placards on trees on property pointed out to him as covered by the Bilyeu lease (R. 143), this could not affect the legal situation. The receiver was only entitled to possession of property of the bankrupt and could not lawfully possess or acquire the property of third persons. *Bankruptcy Act. 70.* A receiver cannot confer jurisdiction upon a court of bankruptcy by wrongful entry upon, and attempted seizure of, property not owned or claimed by and never in the possession of the bankrupt. Further, possession of the surface would not be adverse to the possession of the mineral estate. *Bodcaw Lumber Company vs. Goode, 160 Ark. 48, 254 S.W. 345.* Under the circumstances, it was both legally and physically impossible for the trustee to have possession. Compare *Ohio Oil Company vs. Indiana, 177 U.S. 188.*

The trustee was without authority to test the title of the Mike Lyvers Syndicate to the Bilyeu lease except in a plenary suit brought for that purpose in a court where the bankrupt might have brought or prosecuted it if proceedings in bankruptcy had not been instituted. *Bankruptcy Act Sec. 23.*

III.

There Was No Merger of Mike Lyvers Syndicate With the Morris Syndicate.

In arriving at its conclusion that a merger had taken place between the Mike Lyvers Syndicate and the Harry Morris Guaranteed Gusher Syndicate No. 3, the Court draws an analogy between a common law trust such as the Mike Lyvers Syndicate, and a corporation, and applies the rule of law that in an appropriate case it is permissible for courts to disregard the corporate fiction and hold a parent corporation liable for acts of its subsidiary. We have no disagreement with the Court on the proposition that a trust estate such as the Mike Lyvers Syndicate may in many respects be considered as if it were a corporation, and we agree that it is proper in the present case to treat Mike Lyvers Syndicate as if it were a corporation. *Bankruptcy Act Section 1 (6).* Compare *Hemphill vs. Orloff 277 U.S. 537.* But we would earnestly press upon the consideration of the Court the suggestion that the principle of law referred to has no application to the facts in the case at bar. The doctrine of looking through the corporate entity to hold the parent for the obligations of the subsidiary proceeds on the theory that one is the *alter ego* of the other, and that they are in substance identical. The foundation of this proposition exists in the fact that the parent is the owner of all or substantially all of the stock of the subsidiary and, in addition thereto, exercises a dominant control over it. Merger, on the other hand, proceeds on the assumption that the two corporations are *separate* in substance and in fact, and unites them into one by the execution of appropriate articles of agreement to that effect pursuant to statutory authority. The corporate fiction is disregarded by courts in the exercise of their equitable

powers to do justice in a given situation. Merger, on the other hand, can only be accomplished pursuant to statutory authority therefor and in compliance with the statutory provisions. *Ashley vs. Ryan, 153 U.S. 435.*

It is apparent that the principle of looking beyond the veil of corporate entity in order to fasten the liability of a subsidiary corporation upon the parent corporation is an altogether different thing from merger or consolidation of such corporations. The former principle might have some application to the present case if Mike Lyvers Syndicate owed some obligation to Arkansas Natural Gas Corporation, and Arkansas Natural Gas Corporation were bringing a suit wherein it was attempted to impose liability for such obligation on Harry Morris Guaranteed Gusher Syndicate No. 3, upon the theory that Harry Morris Guaranteed Gusher Syndicate No. 3 was the parent corporation and was responsible for the obligations of the subsidiary. The situation here is very different: the Mike Lyvers Syndicate does not now and has never owed any obligation to defendant. It has brought an action in respect of property belonging to it.

As we have pointed out, however, in order to succeed upon such a theory, it must be shown that the stock ownership of the subsidiary is entirely or substantially held by the parent, so that the ultimate ownership of the two corporations is identical, and in addition to this there must be the element of complete dominion by the parent over the subsidiary. Stock ownership as the foundation of this doctrine of identity of corporations is illustrated by all of the cases which the Court of Appeals cites in its opinion. In the case at bar there is nothing in the record to show that any of the certificates of interest or units in Mike Lyvers Syndicate were held by Harry Morris Guaranteed Gusher Syndicate No. 3, or any one holding any units of that syndicate. So far

as appears, the beneficial ownership of the two trust estates was entirely separate and distinct. Under such circumstances, it would not be possible to hold the Harry Morris Guaranteed Gusher Syndicate No. 3 responsible for the obligations of Mike Lyvers Syndicate on the principle of looking through the corporate fiction.

While it is true that the Declaration of Trust of Mike Lyvers Syndicate authorizes the trustee to effectuate a merger in any manner or form whatsoever, this provision must be read in connection with the general law applicable to mergers and consolidations and must be considered to mean that the trustee is authorized to effectuate a merger or reorganization in any manner or form whatever in compliance with law and in conformity with the Declaration of Trust. No statutory authority is shown for the merger of corporations under the laws of the state of Arkansas, nor does this record show whether the Harry Morris Guaranteed Gusher Syndicate No. 3 was empowered to merge or consolidate with another organization. Our examination of the laws of the state of Arkansas as set forth in Crawford & Moses' Digest (1921) discloses no general authority for the merger or consolidation of corporations. See *Section 677, p. 370,* authorizing consolidation of banking corporations; *Section 6088, p. 1628,* relating to merger of insurance societies; *Section 8514, et seq., pages 2203, et seq.,* dealing with railroad corporations.

Assuming the power to exist, however, no intention is shown on the part of the trustee to accomplish a merger. It is not suggested that any agreement of merger was drawn up and executed, or that any such agreement was ever placed of record in Union County, Arkansas, as a modification of the original Declaration of Trust. It is submitted that the only evidence in the record is that relating to the

joint operation of the producing leases. However, as regards this, it is established by the testimony of defendant's witness McComb that this was simply a joint operation for purposes of economy of administration. See Zug petition (R. 64), verified by McComb as being correct (R. 165). For expenditures made on behalf of Mike Lyvers Syndicate in connection with the operation of these properties reimbursement was made by Mike Lyvers Syndicate (R. 188-191). Even had reimbursement not been made, any expenditures made for the benefit of Mike Lyvers Syndicate by Harry Morris Guaranteed Gusher Syndicate No. 3 or others, would only create the relation of debtor and creditor and might make necessary an accounting, but this is very far from effecting a merger or consolidation of the two separate legal entities. In so far as the Bilyeu lease was concerned, there was certainly no confusion or commingling as to it, for this property was an undeveloped mineral lease, title to which at all times stood on the public records in the name of Mike Lyvers Syndicate. The suggestion that Mike Lyvers was a "straw man" is not helpful in deciding the issue. If Harry Morris himself had been the trustee of both syndicates this would not bring about a merger. It is not uncommon for the same person to be the managing executive officer of a number of corporations, but this does not result in a union of the corporations so operated. The development of holding companies is a familiar example of the management of a number of corporations by the same executive personnel, but the various corporations so managed are not on this account merged or consolidated. If Mike Lyvers as trustee permitted himself to be dominated by Harry Morris on account of personal relations or otherwise this would not involve a merger. There was no legally enforceable control. Compare *Handy & Harman vs. Burnett, adv. opinions U.S. Sup. Ct., Oct. term, 1931.*

The fact that David Morris and Otto Morris (not Harry Morris, the trustee of the Morris Syndicate), (R. 60) signed checks for Mike Lyvers Syndicate does not support the idea that these individuals were acting independently of Mike Lyvers (R. 188-191). These checks were signed pursuant to powers of attorney given to the bank by Mike Lyvers as trustee (R. 138) and this was in conformity with the provisions of the declaration of trust which permitted the trustee to appoint agents and employees as he might determine (R. 23). The activity of these agents was not in derogation of the authority and power of Mike Lyvers as trustee, but was pursuant to such power and authority and in recognition thereof. And should it be claimed that the producing property of Mike Lyvers Syndicate had been abandoned to Harry Morris Guaranteed Gusher Syndicate No. 3, it would not be possible to construe any such abandonment to be effective as a merger. It would simply be another instance of the betrayal of his trust by the trustee. We would ask the Court to consider if it would not be a singular rule of law that would have the effect of declaring that if the operating properties of the Mike Lyvers Syndicate were wrongfully abandoned to the Harry Morris Guaranteed Gusher Syndicate No. 3, the Harry Morris Guaranteed Gusher Syndicate No. 3 should thereby acquire title to all of the other property of Mike Lyvers Syndicate also. Such abandonment, even if conceded, could have no greater effect in transferring title to the property here involved than the two deeds which Mike Lyvers gave to Barney, Trustee, in respect of which the Court of Appeals took occasion to remark, upon the first appeal,

> "While the sole power of alienating the property was thus vested in the trustee, it did not authorize him to donate it to others, *or sacrifice it in a manner*

contrary to his fiduciary obligations to the cestui que trustent or dispose of it otherwise than for their benefit. A fair construction of the article is that the purpose of it was to enable him to act according to his own discretion and judgment, but in keeping with those obligations and in good faith in the discharge of his trust. It is fundamental that he was in duty bound to act for the promotion of their interest. *26 R. C. L. p. 1289; 39 C. J. 348, 349, 350.* The execution of the quit claim deed of this property, viewed as a voluntary act, without consideration, was therefore made without authority, and was a plain breach of the obligations of the trust."

Page vs. Natural Gas & Fuel Corp., 35 Fed. (2) 462, 464.

The contentions of the defendant in respect of merger were ignored by the trial court, and no assignment of error was directed to this question. We now, with respect, submit that the authorities cited by the Court of Appeals are inapplicable, and that upon the facts and the applicable rules of law, no merger of the two syndicates was effected.

Respectfully submitted,

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